UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. S1-4:02 CR 494 CDP DDN
	)	
THEODORE THURSTON,	)	
	)	
Defendant.	)	

SUPPLEMENTAL ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court upon additional pretrial motions of the parties that were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). Another evidentiary hearing was held on March 31, 2003.[1]

The United States has moved for a pretrial determination of the admissibility of defendant's statements. (Doc. 46.) Defendant Theodore Thurston has moved to suppress evidence seized (Doc. 47) and to suppress statements (Doc. 48). After the hearing, defendant filed a memorandum in support of his motions (Doc. 58), and the government filed a response (Doc. 59).

From the evidence adduced at the hearing, the undersigned makes the following findings of fact and conclusions of law:

FACTS

1. St. Louis County Police Detective John Wall is a member of the St. Louis County Drug Enforcement Team. He previously received training from the Drug Enforcement Administration regarding clandestine methamphetamine laboratories. Based on four-

[1]On January 23, 2003, the undersigned filed a Report and Recommendation, following an evidentiary hearing held on December 17, 2002 (Doc. 33). Objections to that Report and Recommendation remain pending (Doc. 37). Following the filing of the superseding indictment, defendant filed motions regarding newly presented issues which are the subject matter of the instant Report and Recommendation.

plus years of experience, he was aware that persons would go to multiple stores and purchase pseudoephedrine to obtain a number of 500-1000 pills. Pseudoephedrine is the main precursor in the manufacture of methamphetamine and is found in many cold medications.

2. On November 7, 2002, at a Target department store on 4250 Rusty Road in St. Louis County, Missouri, Det. Wall was monitoring the cold-medicine aisle, looking for suspicious purchases of pseudoephedrine. He was aware that under Missouri law, no store can sell, at one time, more than three boxes of cold medication containing pseudoephedrine, that no person can possess more than 24 grams of pseudoephedrine, and that no person can possess any amount of pseudoephedrine with the intent to manufacture methamphetamine.

3. Det. Wall saw defendant enter the Target store. He recognized defendant from a previous arrest. Defendant walked to the cold-medicine aisle and obtained two boxes of Target brand cold medication. The two boxes contained a total of 96 pills; each pill contained 60 milligrams of pseudoephedrine. Det. Hall saw defendant walk to the front of the store to check out, leave the store, and get into a green minivan.

4. Det. Wall and other officers followed defendant as he drove off. Defendant proceeded to a Walgreens store, where Det. Wall saw defendant purchase two boxes of a Walgreens brand cold medication containing pseudoephedrine (96 pills, each pill containing 60 milligrams of pseudoephedrine). Defendant returned to his vehicle and drove off.

5. Det. Wall believed defendant's behavior was indicative of the gathering of pseudoephedrine for use in methamphetamine manufacture. Because of defendant's two purchases of pseudoephedrine in two locations in a short time span, as well as Det. Wall's awareness of defendant's previous history with the illicit manufacturing of methamphetamine, Det. Wall directed that

defendant's vehicle be stopped.[2] Det. Wall then approached defendant's vehicle and identified himself; defendant stated that he remembered the detective. Det. Wall asked permission to search defendant's vehicle; defendant orally gave permission and exited the vehicle. Det. Wall had a consent-to-search form with him but did not use it.

6. During the search, Det. Wall found (1) a Walgreens bag containing the two boxes of Walgreens cold medication defendant had purchased, (2) a smaller bag holding sixteen "blister packs" of cold medication, with each blister pack containing 24 pills,[3] (3) three November 7-dated receipts from Walgreens stores and one other receipt, each for the purchase of two boxes of pseudoephedrine cold medications, (4) a burnt piece of aluminum foil in the ashtray, and (5) a hollowed-out "Eagle stick" pen. Det. Wall had never heard of anyone directly "shooting" methamphetamine to get high.

7. Det. Wall placed defendant under arrest and, reading from a DEA 13-A card, advised him of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Defendant indicated that he understood those rights and he agreed to make a statement. Although Det. Wall had a warning-and-waiver form with him, he did not use it prior to interrogation. The atmosphere was relaxed and defendant was cooperative. Det. Wall could smell alcohol on defendant's breath, but defendant did not appear to be impaired. Det. Wall observed nothing that indicated defendant was incapable of understanding his rights. Det. Wall did not make any threats or promises to induce defendant's statement.

8. In response to Det. Wall's questions, defendant stated that he did not know how many cold pills he had purchased, that he had gone to about five stores that day to purchase the pills, and

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[2]Det. Wall testified that he had observed defendant also commit traffic violations, but that he did not stop defendant for such violations, nor did he write about the violations in his police report.

[3]Det. Wall further testified that one cold-medication box usually contains two blister packs, with a total of 48 pills.

that he was not manufacturing methamphetamine but bought the pills for someone else to make methamphetamine. The interview concluded when, in response to Det. Wall requesting permission to search defendant's house for a methamphetamine laboratory, defendant asked to speak with his attorney.[4]

9. Prior to stopping defendant, Det. Wall did not know that defendant had an outstanding federal warrant.

DISCUSSION

A. Reasonable suspicion to justify the stop

The Fourth Amendment applies to seizures of the person, including brief investigatory stops, such as vehicle stops. See United States v. Cortez, 449 U.S. 411, 417 (1981). "An investigative stop of a vehicle does not violate the Fourth Amendment where the police have a reasonable suspicion that the occupant of the vehicle is engaged in criminal activity." United States v. Briley, 319 F.3d 360, 364 (8th Cir. 2003). The Supreme Court defines "reasonable suspicion" as "'a particularized and objective basis' for suspecting the person stopped of criminal activity." Ornelas v. United States, 517 U.S. 690, 696 (1996) (quoting Cortez, 449 U.S. at 417-18). "[A] court must consider the totality of the circumstances surrounding the stop in light of the officer's experience." United States v. Dixon, 51 F.3d 1376, 1381 (8th Cir. 1995).

In view of the following facts, the undersigned finds no Fourth Amendment violation in the initial stop of defendant's vehicle: (1) Det. Wall is an experienced law enforcement officer,

[4]Defendant's version of the stop and search differed from Det. Wall's version. Defendant claimed that (1) an unmarked vehicle without any emergency lights forced him to stop, (2) he was not asked for permission to search his vehicle, (3) he was not given his Miranda rights, (4) he made no statement, and (5) an officer (not Det. Wall) said that, if defendant ever wanted to see his kids again he had better let the officers into the trailer. The undersigned credits Det. Wall's testimony over that of defendant regarding the above-noted discrepancies.

has received specialized methamphetamine-related training, and belongs to St. Louis County's Drug Enforcement Team; (2) Det. Wall knew defendant had a history involving methamphetamine manufacture and had been arrested previously; and (3) Det. Wall saw defendant purchase two boxes of medication containing pseudoephedrine at Target and proceed immediately to Walgreens, where he purchased two more boxes. See id. at 1382 (upholding an investigative stop based on a combination of facts, including that the defendant was thought to have been previously arrested on a drug charge); United States v. Bloomfield, 40 F.3d 910, 919 (8th Cir. 1994) (en banc) (the sum of the patrolman's observations, examined in light of his "training and experience," constituted a reasonable, articulable suspicion of illegal activity justifying the seizure and detention of the defendant and the truck), cert. denied 514 U.S. 1113 (1995); cf United States v. Araque, No. 8:02CR316, 2003 WL 1857495, at *3 (D. Neb. Apr. 10, 2003) (given the defendants' purchases of unusual quantities of both iodine and cold medicine with pseudoephedrine within a very short time, an experienced officer could reasonably suspect that the individuals were collecting materials needed to make methamphetamine).

Moreover, the fact that Det. Wall saw defendant purchase only four boxes of pills (containing less than 24 grams of pseudoephedrine[5]) does not, under the circumstances, mean the detective lacked reasonable suspicion to believe criminal activity was afoot and to have defendant's vehicle stopped. Missouri law prohibits the possession of any amount of pseudoephedrine with intent to manufacture methamphetamine and provides that possession of more than 24 grams of pseudoephedrine is "prima facie evidence of intent" to violate that law. See Mo. Rev. Stat. § 195.246.1-.2. Although in Missouri persons not intending to manufacture methamphetamine may lawfully purchase two boxes of pseudoephedrine-containing medication at each of two stores, an officer need not

[5]Four boxes would contain 192 pills, which, multiplied by 60 milligrams per pill, yields 11,520 milligrams or 11.52 grams.

see a person purchase more than 24 grams of pseudoephedrine in order to have a reasonable suspicion of criminal activity. See United States v. Arvizu, 534 U.S. 266, 272, 276 (2002) (a determination that reasonable suspicion exists need not "rule out the possibility of innocent conduct"). Because prima facie evidence is not required to show probable cause, and probable cause requires a more stringent showing than what is needed to establish reasonable suspicion, then, a fortiori, prima facie evidence is not required to establish reasonable suspicion. Cf. United States v. One Parcel of Real Estate, 963 F.2d 1496, 1501 (11th Cir. 1992) (in forfeiture actions, the government must convince the judge that it had a reasonable ground for belief of guilt, supported by less than prima facie proof, but more than reasonable suspicion); United States v. Roggeman, 279 F.3d 573, 578 (8th Cir.) (the level of suspicion necessary to constitute reasonable suspicion is obviously less demanding than that for probable cause), cert. denied, 123 S. Ct. 79 (2002).

Defendant cites a recent out-of-circuit case, United States v. Kammerud, 02-CR-132-S (W.D. Wis. Mar. 27, 2003), in support of his argument that "four boxes of cold medication, by itself, does not establish probable cause for a search or seizure." (Doc. 58 at 8-9.) In Kammerud, a search warrant was issued upon a drug investigator's observation of several items on the defendant's property: organic solvents, pseudoephedrine, aluminum foil, a 20-pound "LP" cylinder with corrosion consistent with anhydrous ammonia, a 10-pound LP cylinder, and Red Devil lye. See id. at 2-3. The court noted that "[t]here are legitimate uses for all of the items listed, and none by itself would support the conclusion that it was being used to make drugs." Id. at 6.

Defendant's contention--that Kammerud strongly supports the argument that the purchase of four boxes of cold medication, "by itself," does not establish probable cause for a search or seizure --misses the point. The court need not decide whether defendant's purchase of four boxes, by itself, established reasonable suspicion for the initial seizure, because, as already discussed, reasonable

suspicion in this case is founded upon several factors. Even the Kammerud decision, which determined that probable cause supported the issuance of the warrant, recognized the need to consider all of the factors. See id. ("[W]hen this particular set of ingredients and materials is found together, the instant reaction is 'meth lab.'").

Defendant's argument that the vehicle stop was pretextual (Doc. 58 at 7) is not persuasive, given that Det. Wall had reasonable suspicion for suspecting defendant of criminal activity. Cf. United States v. Alcantar, 271 F.3d 731, 736 (8th Cir. 2001) (in deciding whether a stop was pretextual or based on probable cause, the district court applies an objectively reasonable standard; so long as the officer is doing nothing more than he is legally permitted and objectively authorized to do, his actual state of mind is irrelevant for purposes of determining the lawfulness of the stop), cert. denied, 535 U.S. 964 (2002).

B. Consent to search

The products of the search of defendant's vehicle are admissible, because Det. Wall's testimony, which is credible, establishes that defendant consented to the search. See United States v. Pereira-Munoz, 59 F.3d 788, 792 (8th Cir. 1995) (because defendant consented to being searched while he was justifiably detained on reasonable suspicion, the products of the search are admissible). Having considered the factors identified in United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990), the court concludes that defendant's consent to search was voluntary. Without going through every factor mentioned in Chaidez, see id. (these factors should not be applied mechanically), the undersigned notes that defendant is an adult, speaks and understands English, had been previously arrested, was aware of the protections afforded to suspected criminals by the legal system (as shown by his request to speak with his attorney when asked for consent to search his residence), had not been detained long when he consented, was not threatened, physically intimidated, or punished by the police, and

was in a public place. Although Det. Wall believed defendant had been drinking, he did not believe defendant was intoxicated, and no evidence to the contrary has been presented.

C. The arrest

Probable cause to arrest without a warrant exists when the police have information sufficient to cause a reasonable person to believe that the defendant had committed an offense or was then committing an offense. See Beck v. Ohio, 379 U.S. 89, 91 (1964); Smithson v. Aldrich, 235 F.3d 1058, 1062 (8th Cir. 2000). Det. Wall, having lawfully searched defendant's vehicle and found a quantity of pills containing a total of more than 24 grams of pseudoephedrine, had probable cause to arrest defendant.[6] See Mo. Rev. Stat. § 195.246.2 (possession of more than 24 grams of any methamphetamine precursor drug shall be prima facie evidence of intent to violate § 195.246); Aldrich, 235 F.3d at 1062 (the probability, and not a prima facie showing, of criminal activity is the standard of probable cause). In addition to the pills and receipts, the vehicle search also yielded drug paraphernalia, i.e., a burnt piece of aluminum foil and a hollowed-out "Eagle stick" pen. See Mo. Rev. Stat. § 195.233 (prohibiting unlawful use of drug paraphernalia); cf. United States v. Johnson, 427 F.2d 32, 35 (7th Cir.) (an aluminum foil packet is well known to experienced narcotics agents as a hallmark of the traffic in drugs), cert. denied, 400 U.S. 949 (1970).

D. Defendant's statements

The government has the burden of establishing the admissibility of a defendant's pretrial statements by a preponderance of the evidence. See Colorado v. Connelly, 479 U.S. 157, 169-70 (1986); United States v. Astello, 241 F.3d 965, 966

[6]Sixteen blister packs of 24 pills (384 pills), plus two boxes containing a total of 96 pills, multiplied by 60 milligrams per pill, yields 28,800 milligrams or 28.8 grams.

(8th Cir.), cert. denied, 533 U.S. 962 (2001). "A waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently." United States v. Ortiz, 315 F.3d 873, 885 (8th Cir. 2002) (citing Miranda, 384 U.S. at 444)). "A waiver is voluntary if it is 'the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" Id. (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

The government has shown that defendant was advised of--and waived--his Miranda rights prior to questioning, and no credible evidence indicated that Det. Wall, or any other officer at the scene, intimidated, deceived, or coerced defendant into making any statements. See Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

Whereupon,

IT IS HEREBY ORDERED that the motion of the United States for a pretrial determination of the admissibility of defendant's statements (Doc. 46) is denied as moot.

IT IS HEREBY RECOMMENDED that the motions of defendant to suppress evidence and to suppress statements (Docs. 47 and 48) be denied.

The parties are advised they have ten (10) days to file written objections to this Order and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.

ORDER SETTING TRIAL DATE

As directed by the District Judge, this matter is set for a jury trial on the docket commencing May 27, 2003, at 9:00 a.m.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of May, 2003.